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No. 80-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY,
Petitioner

v.

JAMES A. WATT, SECRETARY OF THE INTERIOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The Secretary's brief in opposition does not directly address the grounds we addressed [Pet. 10-14] as reasons for granting the writ: the practical importance of the issue, the invasion of state authority preserved alike by the Act and the federal structure of our nation, the heavy reliance by the majority of the *en banc* court below upon the judgment of a former Secretary, and the fact that the issue can, under the Act, be considered by no lower court other than the sharply divided Court of Appeals for the District of Columbia Circuit. If there be any reason why these considerations do not indicate the desirability of review by this Court, that reason is not suggested by the Secretary.

Instead, the Secretary's brief in opposition is directed solely to our summary showing, by way of precaution [Pet. 14-19], that the decision of the court below is wrong.[1] Our view of the merits is sufficiently indicated

[1] The same may be said of the brief in opposition for the National Wildlife Federation *et al.*

in our petition. Here we undertake only to identify and to disown three strawmen erected and attacked by the Secretary.

1. We do not deny the Secretary's authority to issue suitable regulations to interpret the information requirements of the Act and to guide the states in the development of their own regulations [see Br. in Opp. 14, 15-16]. We do deny the Secretary's power completely to displace the state authority and himself to prescribe the detail of the information requirements, thus reducing state authority to the ministerial act of copying off 33 pages of the Code of Federal Regulations [Pet. 5, 10-11, 15]. The difference is both one of kind and one of degree and is crucial in either view.

2. We complain that the decision below gave the Secretary unlimited power to prescribe whatever regulations he wished, to be adopted by the state agency as a condition to approval of its program [Pet. 17]. The Secretary attacks this complaint [Br. in Opp. 11-12] because the court below recognized [at A, 8a-9a] that the Act delegated four functions to the state agency which presumably could not be withdrawn as a condition of approval. The argument serves only to convict us of not drafting a petition as though it were a statute, with even self-evident exceptions spelled out.

3. The Secretary, quoting our petition completely out of context, characterizes our concern about the Act's intrusion into land use activities normally left to the States as a "constitutional consideration" recently rejected by this Court. [Pet. 11; see Br. in Op. 16.] See also, *e.g.*, *Hodel* v. *Indiana*, 49 U.S.L.W. 4667 (U.S. Sup. Ct., June 15, 1981). Our point was not "constitutional" in nature, but instead it was simply designed to show that when Congress divided the Act's governmental responsibilities between the Secretary and the states, it was acutely aware that it was legislating in a delicate

area, and, accordingly, sought, as the majority below recognized, not to displace the states from much of their traditional role. Our position here is that the Secretary's insistence on dictating detailed permitting information regulations to the states—which, under the Act, indisputably have sole permitting authority—substantially undercuts that Congressional intent.

Finally, the present Secretary avers that he is considering and promulgating proposed regulations better designed than those of his predecessors to accommodate varying local conditions [Br. in Opp. 18]. That is nice, but does not go very far to change the meaning of the statute as it has been construed in heavy deference to the centralized authority asserted by the former Secretary.

CONCLUSION

We urge that the petition for a writ of certiorari, for the reasons stated therein and in this reply, should be granted.

Respectfully submitted,

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